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EX PARTE OR LATE FILED

August 17, 1999

EX PARTE

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street SW, TW-A325
Washington, D.C. 20554

Dear Ms. Salas:

Re: CC Docket No. 96-98
UNE Remand Proceeding

On August 16, 1999, Molly Martin, Bob McKenna and the undersigned, representing U S WEST, met with Jake Jennings and Chris Libertelli to discuss issues in the UNE Remand proceeding.

In accordance with Section 1.1206(b)(2) of the Commission's Rules and Regulations, the original and one copy of this letter, are being filed with your office. Acknowledgment and date of receipt of this transmittal is requested. A duplicate of this letter is provided for this purpose.

Please contact me should you have any questions concerning this matter.

Sincerely,

Melissa Newman

Melissa Newman

Attachment

Cc: Jake Jennings
Chris Libertelli

UNE Remand Proceeding
CC Docket No. 96-98

MCI's August 9, 1999 ex parte filing on switching is palpably wrong on almost every count. Because of the fact that overly inclusive coerced unbundling of switching functionality would be destructive to much of the telecommunications infrastructure, in addition to risking serious damage to incumbent LECs, we provide a brief response to this filing. This response generally follows the outline format presented by MCI.

Introductory matters.

1. MCI starts off with what is a mistruth which sets the tone for the entire ex parte. MCI asserts that: "MCI WorldCom's objective is simple—to ensure that as many business customers in as many locations as possible have the opportunity and competitive benefits from choosing among multiple service providers." This is clearly not MCI's objective. MCI's objective is to obtain a competitive advantage through government regulation. Moreover, in making this point, MCI inadvertently reaffirms its fundamental interest in serving only business customers and other high-margin customers, basically abandoning universal service and all other customers who currently have telephone service provided by incumbents at below-cost rates.

2. MCI's chief economic point is simply contrary to the Act. MCI asserts as a foundation:

> The existence of a CLEC switch in a particular location does not demonstrate that it is generally feasible for other CLECs to serve that location because CLECs have unique business plans and unique sets/locations of existing customers.

This analytical premise is simply well beyond the Act itself. The Act permits the FCC to require unbundling of a particular network element when failure to do so would impair the ability of a reasonably efficient competitor to compete in the marketplace. The idea that the statutory standard can lawfully be manipulated to accommodate the business plans of individual competitors is preposterous. Indeed, given the "pick and choose" language of Section 252(i) of the Act, accepting MCI's suggestion that the impairment standard can be analyzed based upon the unique marketing plans and concepts of every conceivable carrier would obliterate Section 251(d)(2) of the Act altogether. Once a tiny carrier with no assets was able, under MCI's analysis, to obtain access to an unbundled network element which no other carrier could possibly demand, all of the other carriers would then have access to the element under Section 252(i). Basically, MCI is totally unsatisfied with the Supreme Court's *Iowa Utilities Board* decision, and is becoming increasingly creative in seeking to convince the FCC to defy the Supreme Court in the UNE remand proceeding.

3 As a final introductory matter, the MCI ex parte is premised almost entirely on conclusory assertions which are not only wrong, but which MCI makes no effort at all to

support. Frankly, in reviewing the MCI ex parte, it is very important to look for whether MCI makes even a token effort to support its conclusions. In the vast majority of cases, MCI simply makes erroneous statements and assumes that the readers will believe them.

MCI's General Considerations Regarding Switching.

- MCI first claims that switching should be unbundled liberally because CLECs will only purchase unbundled switching when it is absolutely necessary. This is because, claims MCI, switching is "the network element that most allows local exchange providers to differentiate their products." Two observations:

  - First, the claim that the impairment test can be met based on whether a CLEC is interested in purchasing an unbundled element is precisely the argument which the FCC and AT&T/MCI made to the Supreme Court. The Court resoundingly rejected the argument.

  - Second, the argument really does document even further the basic point which U S WEST has made for some time (and which AT&T continues to make with increasing urgency with regard to its own cable modem service): mandatory unbundling of facilities/functions which are competitive or potentially competitive will simply dry up the investment and innovation incentives for all market players, ILECs and CLECs alike.

- MCI's second point is related to its first. MCI claims that wholesale switching markets are unlikely to develop because no one will be willing to purchase wholesale switching. This is because, MCI posits, all CLECs will want to own their own switch. Again, three points:

  - First, this is contrary to MCI's argument that switching should be required to be unbundled until the very wholesale market which MCI claims will never exist has become fully mature.

  - Second, MCI's argument also includes the assumption that no CLEC would be willing to share its switching capacity with another CLEC, at any price. Certainly, as AT&T has pointed out, no company at all would construct switching facilities if forced to share these facilities at TELRIC with their competitors. MCI's argument goes even further, and is tantamount to a claim that market forces will operate so as to make development of a wholesale switching market impossible. This contradiction cannot be understated. MCI is really asking the Commission to adopt a rule which, while individually beneficial to MCI, would have the long term effect of undercutting the future telecommunications infrastructure of the United States even under MCI's own direct logic.

  - Third, MCI uses as its basic premise the assertion that a switch cannot be installed economically unless the CLEC has forty thousand customers served by the switch. This is an erroneous assumption, however, as switches much smaller than

forty thousand lines are available on the market, and can be technically "grown" to meet the demands of an expanding customer base. The UNE Fact Report discusses the availability of smaller switches for smaller CLECs at pages 1-28-1-31, the ability of CLECs to grow these switches at pages 1-23-1-24, and the availability of other switching opportunities for CLECs at pages 1-31-1-35.

- MCI's repeated claim that it needs unbundled local switching to serve high volume business customers is further belied by the actual deployment of competitive switches, including switches deployed by MCI. See UNE Fact Report, pages 1-1-1-22.

MCI's Suggested "Preconditions to Any Restrictions on Right to Lease."

MCI contends that there should be four additional "preconditions" imposed on any FCC decision that the inability of CLECs to obtain unbundled switching from ILECs would impair competition.

- MCI first demands that "a combination of loop, multiplexing, and dedicated transport (i.e., extended loop) must be available, at state approved TELRIC prices, that does not require collocation or other CLEC activity to combine, with no restrictions on use." Absent from this demand by MCI is any effort to subject it to the "necessary" and "impair" tests set forth in Section 251(d)(2). In fact, this proposal by MCI is not even sufficiently detailed to permit thorough analysis.

- MCI next contends that "collocation must be available pursuant to state approved tariffs that comply with the FCC's cageless collocation order in CC 98-147." Collocation is in fact available from U S WEST. Whether states choose to tariff collocation for CLECs is a matter which would seem to be of little direct interest to the FCC.

- MCI next claims that "multiplexing must be available sufficient to use every loop as if it were home-run carrier serving area ("CSA") copper." Needless to say, multiplexing by itself does not guarantee that a particular loop will appear as a home run copper facility. In fact, a requirement that every copper loop must appear as a home run circuit is simply not feasible, and such a requirement could not be implemented. Moreover, such technical issues as how multiple carriers can make use of shared distribution plant, which would be squarely raised by MCI's demand, are just now under study by industry forums, obviously need to be resolved before MCI's demands could be credited. However, the simple answer to this demand by MCI is that MCI has made no attempt at all to document just how it could be squared with the "necessary" and "impair" tests of Section 251(d)(2).

- Finally, MCI claims that "it must be possible to perform hot cuts of loops over to CLEC switches efficiently-at the DS-1 level and higher." On this issue, U S WEST agrees that, failure of an ILEC to perform hot cuts in an efficient manner could disrupt a CLEC's ability to compete, although the claims of MCI and AT&T in this

area are wildly exaggerated. As is discussed below, the Commission might desire to put some hot cut performance standards into the calculus for switching under the "necessary" and "impair" standards. However, it must be kept in mind that performance of a hot cut is not entirely within the control of the ILEC—much delay in a hot cut can, and often is, caused by actions of the CLEC, not the ILEC.

Additional Thoughts on Switching.

A suggestion made by Ameritech on unbundled switching deserves some brief comment. Ameritech has proposed that the Commission consider drawing the line on unbundled switching between business customers with four or more lines, and business customers with fewer than four lines. Several observations:

- First, it is obvious that there is no way that it could be found that the inability of CLECs to obtain unbundled local switching from ILECs would impair competition. These customers already have competitive options available.

- Second, business customers are also the ones most likely to make early use of new technologies and investments. Thus, the unavailability of unbundled ILEC switching for this customer group would coincide with the area where forced unbundling would have the most pernicious impact on technological development and deployment.

- By the same token, we submit that the Ameritech suggestion still makes coerced unbundled switching available over much to broad a base. U S WEST's proposal, which tracks most of the ILEC industry's position, is based on proximity of competitive switches. If a competitive switch is available within fifty miles of an ILEC switch, a strong presumption should arise that the absence of unbundled ILEC switching will not impair competition. This approach is based on sound economics and accurately reflects the reality of the telecommunications market and the technological characteristics of modern switches.

- If the Commission feels that it should add something to the economic calculus (which U S WEST submits is unnecessary), a more proper focus might be on tying hot cut performance to the impairment standard. In other words, part of the test would be based on the ILEC's ability to demonstrate that it is able to transfer customers to the CLEC's switch in a timely manner. Such a test could depend upon a metric associated with hot cut intervals and would be based on an average interval computed on a state wide basis each month. Hot cut measurements could be based on a wire center or a study area basis. If an ILEC's duty to offer unbundled switching at TELRIC prices depended on its ability to meet reasonable CLEC hot cut expectations, we would assume that hot cut problems would become virtually non-existent. We do note a word of caution here. Hot cuts are not within the exclusive control of ILECs, and any measurement must be based on ILEC performance. Given the incentive of some CLECs to use the unbundling process to disrupt ILEC operations (and delay RBOC entry into the long distance market), the Commission must be careful that any hot cut measurements actually measure the proper activity.

Additional Thoughts on Transport.

BellSouth has suggested that an additional analytical factor be placed in the formula for determining whether unbundled transport should be available. Specifically, BellSouth has suggested that the "impairment" test for unbundled transport be based on whether a CLEC facility is located between a customer and an ILEC wire center, or between two ILEC wire centers. We have several ideas on this suggestion:

- As is the case with the Ameritech switching proposal, the BellSouth compromise goes beyond what sound economics dictates. Of course, BellSouth is completely correct in its assumption that transport between two ILEC wire centers cannot possibly meet the impairment test if a CLEC facility lies between the wire centers. But the test would still leave transport facilities subject to mandatory unbundling even though the impairment test is not met. The U S WEST suggestion—that there be a presumption against mandatory unbundling for all wire centers which serve more than 20,000 local loops and have a collocated CLEC—seems better in tune with sound economics and the purpose of the Act.

- Another major issue to be considered in evaluating transport. Transport cannot be unbundled as a means of arbitraging ILEC special access tariffs for the same service. It would be totally anomalous to hold that competition would be impaired in the local transport area without considering how ILEC special access was available, how it was configured, what functions it offered, etc. Furthermore, transport cannot be ordered to be unbundled solely on the basis that ILEC special access is overpriced. In other words, existing special access ILEC tariffed services must be considered in any impairment analysis, including how, when and where to make transport available as an unbundled element.